No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, ET AL., PETITIONERS

v.

CARLTON & HARRIS CHIROPRACTIC, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
LINDSEY POWELL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

THOMAS M. JOHNSON, JR.
General Counsel
JACOB M. LEWIS
Associate General Counsel
SCOTT M. NOVECK
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory provisions involved 2
Statement 2
Summary of argument 7
Argument:
I. The Hobbs Act barred petitioners from collaterally attacking the validity of the 2006 FCC order in civil litigation outside the Hobbs Act's channels 11
A. The Hobbs Act provides the exclusive channel for obtaining judicial review of covered agency orders 11
B. Petitioners' contrary arguments lack merit 19
1. Petitioners' arguments lack a basis in the text 19
2. The Administrative Procedure Act does not support petitioners' reading of the Hobbs Act 24
3. Petitioners' other statutory arguments also lack merit 30
4. Principles of constitutional avoidance do not support petitioners' approach 31
II. Petitioners' argument that the 2006 FCC order was not reviewable under the Hobbs Act is not properly before this Court, and lacks merit in any event 33
Conclusion 35
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

B. F. Goodrich Co. v. *Northwest Indus., Inc.*, 424 F.2d 1349 (3d Cir.), cert. denied, 400 U.S. 822 (1970) 17

Cases—Continued: Page

Biggerstaff v. *FCC*, 511 F.3d 178 (D.C. Cir. 2007) 5
Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) 31
Boudes v. *Willingham*, 321 U.S. 503 (1944) 25
CE Design, Ltd. v. *Prism Bus. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010), cert. denied, 562 U.S. 1138 (2011) 3, 13
Calderon v. *Ashmus*, 523 U.S. 740 (1998) 20
Central Texas Tel. Coop., Inc. v. *FCC*, 402 F.3d 205 (D.C. Cir. 2005) 34
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 6
City of Peoria v. *General Elec. Cablevision Corp.*, 690 F.2d 116 (7th Cir. 1982) 13
Daniels v. *Union Pac. R.R.*, 530 F.3d 936 (D.C. Cir. 2008) 13
Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 28
Environmental Def. v. *Duke Energy Corp.*, 549 U.S. 561 (2007) 28
FCC v. *ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984) 8, 16
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 29, 32
Functional Music, Inc. v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959) 30
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 31
Jones v. *Flowers*, 547 U.S. 220 (2006) 32
Lambert Run Coal Co. v. *Baltimore & Ohio R.R.*, 258 U.S. 377 (1922) 18
Leyse v. *Clear Channel Broad., Inc.*, 545 Fed. Appx. 444 (6th Cir. 2013), cert. denied, 135 S. Ct. 57 (2014) 13, 19

Cases—Continued: Page

Mais v. *Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014) 12
Mims v. *Arrow Fin. Servs.*, 565 U.S. 368 (2012) 3
Nack v. *Walburg*, 715 F.3d 680 (8th Cir. 2013), cert. denied, 572 U.S. 1028 (2014) 13
Natural Res. Def. Council v. *Nuclear Regulatory Comm'n*, 666 F.2d 595 (D.C. Cir. 1981) 28
Norton v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) 25
Port of Boston Marine Terminal Ass'n v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) ..... *passim*
Railway Mail Ass'n v. *Corsi*, 326 U.S. 88 (1945) 20
Russell Motor Car Co. v. *United States*, 261 U.S. 514 (1923) 20
SBC Inc. v. *FCC*, 414 F.3d 486 (3d Cir. 2005) 34
Sorenson Commc'ns, Inc. v. *FCC*, 567 F.3d 1215 (10th Cir. 2009) 34
Stokeling v. *United States*, 139 S. Ct. 544 (2019) 14
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) 31
US West Commc'ns, Inc. v. *Hamilton*, 224 F.3d 1049 (9th Cir. 2000) 34
United States v. *Any & All Radio Station Transmission Equip.*, 207 F.3d 458 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001) 13
United States v. *Dunifer*, 219 F.3d 1004 (9th Cir. 2000) 13
United States v. *International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) 29, 32
United States v. *Jones*, 565 U.S. 400 (2012) 33
United States v. *Ruzicka*, 329 U.S. 287 (1946) 32
United States v. *Stevens*, 559 U.S. 460 (2010) 20

Cases—Continued: Page

United States v. *Szabo*, 760 F.3d 997 (9th Cir. 2014) 26
Venner v. *Michigan Cent. R.R.*, 271 U.S. 127 (1926) 9, 17, 21, 23, 30
WWHT, Inc. v. *FCC*, 656 F.2d 807 (D.C. Cir. 1981) 28
Water Transp. Ass'n v. *ICC*, 819 F.2d 1189 (D.C. Cir. 1987) 26
Woods v. *Hills*, 334 U.S. 210 (1948) 8, 14
Yakus v. *United States*, 321 U.S. 414 (1944) ..... *passim*

Constitution, statutes, and regulations:

U.S. Const. Art. III 13, 25
Act of June 18, 1910, ch. 309, 36 Stat. 539-540 17
Act of Oct. 22, 1913, ch. 32, 38 Stat. 208 17
39 Stat 219-220 17
39 Stat 220 23
Administrative Orders Review Act, ch. 1189, 64 Stat. 1129 1
28 U.S.C. 2342 ..... *passim*, 1a
28 U.S.C. 2342(1) 2, 11, 33, 1a
28 U.S.C. 2342(2)-(7) 2, 1a
28 U.S.C. 2342(3) 34, 1a
28 U.S.C. 2342(5) 34, 1a
28 U.S.C. 2344 ..... 2, 18, 2a
28 U.S.C. 2348 ..... 2, 3a
28 U.S.C. 2349 ..... 21, 22
28 U.S.C. 2349(a) 21, 22, 3a
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 10
5 U.S.C. 703 ..... 10, 24, 25, 26, 28, 4a

Statutes and regulations—Continued: Page

Communications Act of 1934 ch. 652, 48 Stat. 1064 (47 U.S.C. 151 *et seq.*):
§ 402(a), 48 Stat. 1093 17
47 U.S.C. 402(a) 2, 11, 22, 33, 11a
47 U.S.C. 402(b) 2
47 U.S.C. 405 26
47 U.S.C. 501-503 3
Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 8
§ 203(a), 56 Stat. 31 13
§ 204, 56 Stat. 31-33 13
§ 204(d), 56 Stat. 33 ..... 8, 13
Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 3
47 U.S.C. 227(a)(5) 3, 5, 4a
47 U.S.C. 227(b)(1)(C) 3, 5a
47 U.S.C. 227(b)(2) (2012 & Supp. V 2017) 3, 6a
47 U.S.C. 227(b)(3) 3
47 U.S.C. 227(c)(5) 3
8 U.S.C. 1252(a)(1) 2
28 U.S.C. 46 (1934) 17, 22
28 U.S.C. 1507 29
28 U.S.C. 2112(a)(3) 2
33 U.S.C. 1369(b)(2) 23
42 U.S.C. 5841(f) 2
44 U.S.C. 1507 29
50 U.S.C. 167h(b) 2
47 C.F.R.:
Section 1.429(j) 26
Section 1.429(*l*)(1) 26

Miscellaneous: Page

Samuel A. Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316 (1975) 25

3 *Bouvier's Law Dictionary and Concise Encyclopedia* (3d ed. 1914) 12

FCC:

Public Notice: Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding (Sept. 8, 2003), https://docs.fcc.gov/public/attachments/DOC-238758A1.pdf 5

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, In re:

17 FCC Rcd 17,459 (2002) 4

18 FCC Rcd 14,014 (2003) 4

21 FCC Rcd 3787 (2006) 5

68 Fed. Reg. 53,740 (Sept. 12, 2003) 5

71 Fed. Reg. 25,967 (May 3, 2006) 5

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 14

The Oxford English Dictionary (2d ed. 1989):

Vol. 4 12

Vol. 9 12

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 25, 26

Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tulane L. Rev. 733 (1983) 25

Webster's New International Dictionary of the English Language (2d ed. 1958) 8, 11, 12

16 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2012 & Supp. 2018) 27

In the Supreme Court of the United States

No. 17-1705

PDR NETWORK, LLC, ET AL., PETITIONERS

v.

CARLTON & HARRIS CHIROPRACTIC, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE UNITED STATES

The Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, vests courts of appeals with "exclusive jurisdiction * * * to determine the validity" of certain federal agency actions. 28 U.S.C. 2342. This case presents the question whether a litigant in a private district-court lawsuit may collaterally attack the validity of a Federal Communications Commission (FCC or Commission) order that could have been challenged under the Hobbs Act when it was issued. Such collateral attacks would undermine the interests of the United States and regulated parties in conclusively determining the validity of covered agency actions. The United States therefore has a substantial interest in the question presented.

STATUTORY PROVISIONS INVOLVED

The relevant statutes are reprinted in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

1. The Hobbs Act gives the courts of appeals, other than the Federal Circuit, "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency actions, including "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1); see 47 U.S.C. 402(a).[1] The Act also applies to certain actions of the Secretary of Agriculture, Secretary of Housing and Urban Development, Secretary of Interior, Secretary of Transportation, Board of Immigration Appeals, Federal Maritime Commission, Nuclear Regulatory Commission, and Surface Transportation Board. See 8 U.S.C. 1252(a)(1); 28 U.S.C. 2342(2)-(7); 50 U.S.C. 167h(b); see also 42 U.S.C. 5841(f).

"Any party aggrieved by" a final agency action covered by the statute "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. "The action shall be against the United States," *ibid.*, and "the agency * * * may appear as [a] part[y] thereto * * * as of right," 28 U.S.C. 2348. When more than one petition for review is filed seeking review of a final agency order, the petitions are consolidated in a single court of appeals. 28 U.S.C. 2112(a)(3).

These requirements "promote[] judicial efficiency, vest[] an appellate panel rather than a single district

---

[1] Review of additional FCC decisions is governed by 47 U.S.C. 402(b), which vests exclusive jurisdiction in the D.C. Circuit.

judge with the power of agency review, and allow[] uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress." *CE Design, Ltd.* v. *Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010) (citations and internal quotation marks omitted), cert. denied, 562 U.S. 1138 (2011). They also "ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970) (*Transatlantic*).

2. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits the use of a fax machine to send an "unsolicited advertisement." 47 U.S.C. 227(b)(1)(C). The statute defines "unsolicited advertisement" to include "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. 227(a)(5).

The government has authority to enforce the TCPA. See 47 U.S.C. 501-503. The TCPA also creates private rights of action to enforce certain provisions and regulations. See 47 U.S.C. 227(b)(3) and (c)(5). Federal and state courts have concurrent jurisdiction over private TCPA lawsuits. See *Mims* v. *Arrow Fin. Servs.*, 565 U.S. 368, 371-372 (2012).

Congress authorized the FCC to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. 227(b)(2) (2012 & Supp. V 2017). In 2002, the FCC sought comment on the appropriate regulatory treatment of calls offering "free" goods or services.

17 FCC Rcd 17,459, 17,478 ¶ 31. The Commission observed that, "while these calls do not purport to sell something," they "often * * * are intended to generate future business" and are "motivated in part by the desire to ultimately sell additional goods or services." *Ibid.* The FCC also sought comment on issues relating to unsolicited fax advertisements. *Id.* at 17,482-17,484 ¶¶ 37-40.

In July 2003, following extensive public comment, the FCC issued an order ruling that "[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services" constitute "unsolicited advertisements" under the TCPA. 18 FCC Rcd 14,014, 14,097-14,098 ¶ 140. The agency subsequently received numerous petitions for clarification or reconsideration. One petition, filed by a healthcare publishing company, asked the FCC to reconsider or clarify its interpretation to exclude faxes offering free information about pharmaceutical products to pharmacists or free medical seminars to physicians.[2] Another asked the FCC to clarify that faxes offering "specialized trade or business publications provided at *no charge*" are not "unsolicited advertisements."[3] The FCC issued

---

[2] CG 02-278 Pet. of Jobson Publ'g L.L.C. at 1 (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509934940; see CG 02-278 Pet. of Coal. for Healthcare Comme'n (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509935015 (similar).

[3] CG 02-278 Pet. of Proximity Mktg. at 3 (Aug. 6, 2003), https://www.fcc.gov/ecfs/filing/5509535325; see CG 02-278 Pet. of Am. Bus. Media (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509934906 (similar).

a public notice seeking comment on the various petitions, including the two petitions described above.[4]

In 2006, the FCC issued a further order to implement then-recent statutory changes and "to address certain issues raised in petitions for reconsideration of" the 2003 order. 21 FCC Rcd 3787, 3788 ¶ 1. The 2006 order stated that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogues, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *Id.* at 3814 ¶ 52. The Commission explained that "'free' publications are often part of an overall marketing campaign" because, "while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available." *Ibid.* The FCC concluded that "such messages describe the 'quality of any property, goods, or services'" under the TCPA's definition of "unsolicited advertisement." *Ibid.* (quoting 47 U.S.C. 227(a)(5)).

The FCC published a summary of this determination in the Federal Register. 71 Fed. Reg. 25,967, 25,973 (May 3, 2006). Two parties petitioned for judicial review of the order, but their challenge was dismissed on procedural grounds. *Biggerstaff* v. *FCC*, 511 F.3d 178 (D.C. Cir. 2007).

3. Petitioners publish the *Physicians' Desk Reference*, a compendium of prescription-drug information. Manufacturers pay to have their drugs included, Pet. App. 3a, and petitioners make the reference available to physicians and others free of charge, *id.* at 35a.

---

[4] https://docs.fcc.gov/public/attachments/DOC-238758A1.pdf; see 68 Fed. Reg. 53,740 (Sept. 12, 2003).

According to the complaint, PDR Network sent respondent an unsolicited fax describing the benefits of the *Physicians' Desk Reference* and inviting respondent to request a free electronic version. Pet. App. 3a-4a. Respondent filed suit, alleging that petitioners had violated the TCPA by sending an unsolicited fax advertisement. *Id.* at 2a. Respondent sought to represent a class consisting of itself and other entities that had received the same fax. *Id.* at 4a.

Petitioners moved to dismiss the complaint for failure to state a claim. They "argued that the fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for sale." Pet. App. 4a-5a. Respondent opposed, citing the 2006 FCC order. *Id.* at 5a. Respondent further urged that, because the Hobbs Act vests courts of appeals with exclusive jurisdiction to determine the validity of final FCC orders, the district court could not reject or ignore the FCC's interpretation.

The district court granted petitioners' motion to dismiss. Pet. App. 32a-43a. The court analyzed the 2006 FCC order under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 39a-40a. At step one of the *Chevron* analysis, the court held that the term "unsolicited advertisement" in the TCPA is unambiguously limited to faxes with a commercial aim. *Id.* at 40a-41a; see *id.* at 36a-37a. It concluded that the FCC's interpretation in the 2006 order therefore was not entitled to deference. *Id.* at 40a. The court also viewed the text of the 2006 order as consistent with the court's interpretation of the TCPA.

Id. at 40a-41a. Finally, the court concluded that respondent had not pleaded facts that would demonstrate that the fax here had a commercial aim. *Id.* at 42a-43a.

4. The court of appeals reversed. Pet. App. 1a-31a. The court observed that "[n]either party ha[d] disputed that the 2006 FCC rule is the sort of 'final order' contemplated by the Hobbs Act." *Id.* at 7a n.1. It then concluded that "[t]he district court erred when it eschewed the Hobbs Act's command in favor of *Chevron* analysis to decide whether to adopt the 2006 FCC Rule." *Id.* at 8a. The court rejected petitioners' argument that the Hobbs Act did not apply because "the district court did not specifically invalidate" the FCC's rule, but "merely chose not to apply it." *Id.* at 10a. It concluded that "[i]nvalidation by any other name still runs afoul of the Hobbs Act's constraints." *Ibid.* The court of appeals also concluded that the 2006 order's "meaning is plain," *id.* at 13a, and that the order articulates "this simple rule: faxes that offer free goods and services are advertisements under the TCPA," *id.* at 14a.

Judge Thacker dissented. Pet. App. 19a-31a. Applying *Chevron*, she concluded that the TCPA is ambiguous as to whether an "advertisement" must have a commercial aim, and that the 2006 FCC order did require such a purpose. *Id.* at 25a-26a.

5. This Court granted certiorari, limited to the question whether the Hobbs Act required the district court in this case to accept the FCC's interpretation of the TCPA.

SUMMARY OF ARGUMENT

The Hobbs Act's grant of exclusive jurisdiction to the courts of appeals to determine the validity of particular agency orders deprives district courts and state courts

of authority to determine those orders to be invalid outside of the Hobbs Act's channels.

I. A. 1. The Hobbs Act's language is clear. A court "determines" the validity of an order when it "settle[s] a question or controversy about" the order's validity. *Webster's New International Dictionary of the English Language* 711 (2d ed. 1958) (*Webster's Second*). An order is "valid," in turn, if it is "sound [or] good," or "legally sufficient or efficacious; incapable of being rightfully overthrown or set aside." *Id.* at 2813. Consistent with that language, every court of appeals to consider the issue has determined that the Hobbs Act provides the exclusive procedure through which courts may decide whether a covered order is legally sound, and forecloses courts from making such determinations in civil litigation between private parties.

2. History confirms the statute's meaning. Congress borrowed the formulation here from the Emergency Price Control Act of 1942 (EPCA), ch. 26, 56 Stat. 23, which created "exclusive jurisdiction" in a particular court to "determine the validity of" certain price control orders. EPCA § 204(d), 56 Stat. 33. This Court interpreted that language to foreclose challenges to covered orders in enforcement proceedings, outside the prescribed statutory channels. *Woods* v. *Hills*, 334 U.S. 210, 213-214 (1948); *Yakus* v. *United States*, 321 U.S. 414, 429-430 (1944).

3. This Court's cases, too, establish that the Hobbs Act bars collateral attacks like those here. In *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970), the Court found a defense in a civil suit barred because it would amount to a collateral attack on a determination of the Federal Maritime Commission (FMC). In *FCC* v. *ITT World*

Communications, Inc., 466 U.S. 463, 468 (1984), the Court similarly barred an attempt to enjoin certain FCC consultations because the FCC had denied a rulemaking petition raising the same basic arguments. In applying a predecessor statute containing much of the Hobbs Act's operative language, this Court likewise focused on whether the effect of a litigant's claim would be to deem covered agency action invalid. *Venner* v. *Michigan Cent. R.R.*, 271 U.S. 127, 128-130 (1926).

4. Statutory text is reinforced by structure. The Hobbs Act requires that suits to determine the validity of covered orders be brought against the United States, to "ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Transatlantic*, 400 U.S. at 70. That design would be "vitiate[d]" if courts could determine covered orders to be invalid in civil suits between private parties, without the United States' participation. *Ibid.* Federal law also imposes stringent deadlines for Hobbs Act challenges, and provides for consolidation of such challenges in a single court of appeals, in order to provide swift, nationwide determinations of orders' validity. That structure would be undermined if litigants could obtain determinations that covered orders were invalid outside of the statutory time limits and centralized channels.

B. 1. Petitioners urge that the Hobbs Act's conferral of exclusive jurisdiction to "determine the validity" of covered enactments refers only to declaratory-judgment suits. But petitioners identify no definition, case, or treatise that supports that limitation. Surrounding provisions do not do so, either.

2. Petitioners also invoke the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But the APA makes clear that agency actions are not subject to judicial review in enforcement proceedings when a statute creates a "prior, adequate, and exclusive" opportunity for review. 5 U.S.C. 703. The Hobbs Act satisfies the concept of adequacy developed in decisions of this Court and incorporated into the APA. Petitioners' inadequacy arguments are untethered to that concept, and lack merit on their own terms.

3. Petitioners invoke other statutes that permit challenges to regulations during enforcement actions. But those statutes lack the Hobbs Act's broad language, and do not share the relevant statutory history. Petitioners also invoke court of appeals decisions holding that litigants in Hobbs Act suits may call into question past orders that formed the basis for the agency action under review. But those decisions simply address the scope of timely Hobbs Act suits. The same circuit courts uniformly hold that litigants may not circumvent the Hobbs Act by challenging covered orders in civil suits between private parties. And the presumption of reviewability, on which petitioners also rely, has no application because the Hobbs Act provides a mechanism for judicial review of the covered agency actions.

4. Petitioners raised no constitutional arguments below, and constitutional avoidance has no role when the statutory text is clear. Moreover, neither due process nor separation of powers bars Congress from establishing an exclusive channel for judicial review of certain agency orders.

II. Petitioners' belated contention that the FCC order in this case would not have been reviewable under the Hobbs Act is forfeited. The court of appeals found

it undisputed that the order was covered by the Hobbs Act. Petitioners did not challenge that determination in seeking certiorari or raise any argument pertaining to interpretive rules. In any event, the Hobbs Act covers "all final orders" of the FCC, aside from certain licensing decisions. 28 U.S.C. 2342(1); 47 U.S.C. 402(a). It draws no distinction between legislative and interpretive rules.

ARGUMENT

I. THE HOBBS ACT BARRED PETITIONERS FROM COLLATERALLY ATTACKING THE VALIDITY OF THE 2006 FCC ORDER IN CIVIL LITIGATION OUTSIDE THE HOBBS ACT'S CHANNELS

The Hobbs Act confers on the courts of appeals "exclusive jurisdiction" to "determine the validity of" specified categories of agency actions, including certain final orders of the FCC. 28 U.S.C. 2342; 47 U.S.C. 402(a). That exclusivity promotes finality, judicial economy, and the uniform interpretation of agency rules and orders, and it ensures that the United States is a party to the proceeding. As every court of appeals to address the question has determined, the Hobbs Act's jurisdiction-channeling provision precludes collateral attacks on covered agency orders in private state- or district-court litigation.

A. The Hobbs Act Provides The Exclusive Channel For Obtaining Judicial Review Of Covered Agency Orders

1. By vesting the courts of appeals with exclusive jurisdiction to "determine the validity of" specified agency actions, 28 U.S.C. 2342, the Hobbs Act establishes the exclusive procedure and venue to "settle a question or controversy about" such actions' validity. *Webster's*

Second 711; accord *ibid.* (defining "determine" as "decide by authoritative or judicial sentence"); 4 *The Oxford English Dictionary* 550 (2d ed. 1989) ("To settle or decide (a dispute, question, matter in debate) as a judge or arbiter."). A court determines an order's "validity" when it decides whether the order is "sound [or] good," or "legally sufficient or efficacious; incapable of being rightfully overthrown or set aside." *Webster's Second* 2813 (defining "valid"); accord 9 *The Oxford English Dictionary* 410; 3 *Bouvier's Law Dictionary and Concise Encyclopedia* 3387 (3d ed. 1914).

Petitioners contend (Br. 19) that the Hobbs Act's exclusivity provision "speaks *only* to jurisdiction over a specific type of proceeding: one for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government." The text of the statute does not support that reading. To be sure, a court may "determine the validity of" an agency action in a suit brought against the government in which the plaintiff seeks declaratory or injunctive relief. But a court that holds an agency order to be invalid in the course of adjudicating one private party's liability to another is likewise "determin[ing]" the order's "validity."

Every court of appeals to address the issue has accordingly construed the Hobbs Act to bar courts from determining the validity of covered agency actions in *any* proceeding outside the Hobbs Act's channels, whether or not the litigant who disputes the action's validity seeks declaratory or injunctive relief against the government. They have applied the Hobbs Act to preclude challenges to agency regulations in suits between private parties, *e.g.*, *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119-1121 (11th Cir.

2014); *Leyse* v. *Clear Channel Broad., Inc.*, 545 Fed. Appx. 444, 459 (6th Cir. 2013), cert. denied, 135 S. Ct. 57 (2014); *Nack* v. *Walburg*, 715 F.3d 680, 685-687 (8th Cir. 2013), cert. denied, 572 U.S. 1028 (2014); *CE Design, Ltd.* v. *Prism Bus. Media, Inc.*, 606 F.3d 443, 447-448 (7th Cir. 2010), cert. denied, 562 U.S. 1138 (2011); *Daniels* v. *Union Pac. R.R.*, 530 F.3d 936, 940-941 (D.C. Cir. 2008); *City of Peoria* v. *General Elec. Cablevision Corp.*, 690 F.2d 116, 119-121 (7th Cir. 1982), and to preclude the assertion of such challenges as defenses to civil enforcement actions brought by the government, *e.g.*, *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000); *United States* v. *Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001).

2. The Hobbs Act's history confirms the clear import of the statutory text.

The Hobbs Act language vesting the courts of appeals with "exclusive jurisdiction" to "determine the validity of" covered orders derives from the EPCA. Under the EPCA, a party wishing to challenge orders fixing maximum prices and rents was required to file a protest with a federal administrator—and, when the statute was enacted, to do so within sixty days. § 203(a), 56 Stat. 31. An aggrieved party could then appeal to a special court comprised of Article III judges, which had "exclusive jurisdiction to determine the validity of" a covered order, subject to review by this Court. § 204(d), 56 Stat. 33; see § 204, 56 Stat. 31-33.

This Court construed the EPCA's jurisdiction-channeling provision to bar other courts from determining the validity of covered orders in all types of litigation, including enforcement suits. In *Yakus* v. *United*

States, 321 U.S. 414 (1944), the Court held that the statute deprived district courts of "power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation." *Id.* at 429; see *id.* at 430. The Court similarly found "no doubt" that the EPCA barred a district court "from determining the validity of an individual rent order" in a civil enforcement suit against a landlord to recover allegedly excessive rents, "even though the defense to the action brought there was based on the alleged invalidity of the order." *Woods* v. *Hills*, 334 U.S. 210, 213-214 (1948).

When language is "obviously transplanted from another source, whether the common law or other legislation, it brings the old soil with it." *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) (citation omitted) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). By incorporating EPCA language that this Court had authoritatively construed, Congress signaled its intent that the Hobbs Act's grant of "exclusive jurisdiction" to "determine the validity" of specified agency actions should be understood in a like manner.

3. a. This Court has interpreted the Hobbs Act as barring litigants from challenging the validity of covered agency orders during suits between private parties.

In *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), vessel owners refused to pay certain cargo fees, asserting that the fees were invalid without pre-approval from the FMC. *Id.* at 70. The port operator brought suit for damages and declaratory relief against a vessel-owner organization. *Ibid.* The district court stayed the proceedings to allow the parties to obtain a ruling from the

FMC, which concluded that the fees were largely valid because they had not required pre-approval. *Ibid.* An affected carrier then moved to intervene in the damages action, on the ground that it would be liable for part of any judgment. *Id.* at 67. The court granted intervention, but refused to consider the carrier's argument—raised as a defense to potential civil liability—that the FMC had erred in deeming the tariff revisions valid. *Ibid.*

This Court upheld the district court's refusal to consider the carrier's arguments because that court was "without authority to review the merits of the Commission's decision." *Transatlantic*, 400 U.S. at 69. It relied on the Hobbs Act's "explicit" statement that "'[t]he court of appeals has exclusive jurisdiction to . . . determine the validity of'" final orders of the FMC. *Ibid.* (citation omitted). The Court explained that an exception for cases involving referrals to the FMC "would vitiate the scheme of the [Hobbs Act]—a scheme designed to ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Id.* at 70.

This Court also rejected the carrier's argument that, because it had not been a party to the FMC proceedings, it was "not bound by the Commission's action." *Transatlantic*, 400 U.S. at 71. The Court explained that the carrier was in fact "represented before the Commission and ha[d] previously made numerous claims to party status." *Ibid.* The Court further held that, "[e]ven if [the carrier] was not a formal party" in the administrative proceeding, it was not entitled to raise a collateral attack "in a different and inappropriate forum" because "[the carrier's] interests were

clearly at stake" in the administrative proceeding, "it had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals," and "[i]t chose not to do so." *Id.* at 72. The Court's application of the Hobbs Act to preclude consideration of a legal question in a private damages suit confirms that the Act's preclusive effect extends beyond suits seeking declaratory or injunctive relief against the government.

b. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984), similarly made clear that the Hobbs Act jurisdictional inquiry turns on whether a litigant's claims would require a court to engage in "review of final [covered] FCC orders." *Id.* at 468. The plaintiffs had filed a rulemaking petition asking the FCC to disclaim intent to engage in certain consultations. *Id.* at 465. After the agency denied that petition, the plaintiffs filed suit in district court. *Id.* at 465-468. They did not seek judicial relief with respect to the FCC order, but instead requested that the court enjoin the consultations themselves. *Id.* at 468. This Court held that the district court could not entertain the suit because the Hobbs Act establishes the exclusive avenue for "review of final FCC orders," and "[l]itigants may not evade" the Act's strictures "by requesting the District Court to enjoin action that is the outcome of the agency's order." *Ibid.* That decision confirms that the Hobbs Act inquiry turns not on the form of relief requested, but on whether a claim called upon the court to "determine the validity" of a covered order. 28 U.S.C. 2342.

c. In construing closely related statutes, courts have likewise focused on whether a suit is "in substance a collateral attack on [a covered] order" or whether the "practical effect of a successful suit would contradict

or countermand" a covered order. *B. F. Goodrich Co.* v. *Northwest Indus., Inc.*, 424 F.2d 1349, 1352-1354 (3d Cir.), cert. denied, 400 U.S. 822 (1970).

This Court prescribed that approach in construing the Act of Oct. 22, 1913 (Urgent Deficiencies Act), ch. 32, 38 Stat. 208, which governed review of many final FCC orders before the Hobbs Act's enactment. See Communications Act of 1934, ch. 652 § 402(a), 48 Stat. 1093. That statutory scheme provided the template for a substantial portion of the Hobbs Act's language, by conferring on specially constituted courts "exclusive jurisdiction" over suits to "enjoin, set aside, annu[]l, or suspend[]" certain orders. 28 U.S.C. 46 (1934); see Act of June 18, 1910, ch. 309, 36 Stat. 539-540 (establishing "exclusive" jurisdiction in a commerce court over "[c]ases brought to enjoin, set aside, annul, or suspend" certain orders); Urgent Deficiencies Act, 38 Stat. 219-220 (transferring jurisdiction of the commerce court to district courts operating under special procedures).

In applying that exclusive-jurisdiction provision, this Court focused on the practical effects of particular suits. It explained in *Venner* v. *Michigan Central Railroad*, 271 U.S. 127 (1926), that a suit was subject to the exclusive-jurisdiction provision, even if it "does not expressly pray that [a covered] order be annulled or set aside," if the suit "assail[s] the validity of the order and pray[s] that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." *Id.* at 130. Accordingly, a shareholder in a railroad could not bring a suit against the railroad outside the channels of Urgent Deficiencies Act review, when the shareholder sought to enjoin the railroad from carrying out an agreement that the ICC had approved.

Id. at 129. In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U.S. 377 (1922), the Court similarly held that a mining company's suit against a railroad to enjoin it from distributing coal cars constituted a suit to set aside an ICC order because an ICC order had sanctioned the relevant coal-car schedule. *Id.* at 381-382.

4. The Hobbs Act's structure and objectives reinforce the understanding described above. Adherence to the Hobbs Act's jurisdictional scheme "ensure[s] that the Attorney General has an opportunity to represent the interest of the Government whenever an order of the specified agencies is reviewed." *Transatlantic*, 400 U.S. at 70; see 28 U.S.C. 2344. Here, as in *Transatlantic*, that aspect of the statutory design would be "vitiate[d]," 400 U.S. at 70, if petitioners could assert the invalidity of the 2006 FCC order as a defense to respondent's TCPA suit.

Permitting such collateral challenges would undermine other aspects of the statutory scheme as well. Many provisions governing Hobbs Act review are designed to facilitate quick, nationwide resolution of the validity of covered agency actions. These provisions establish a 60-day filing deadline, mandate direct court-of-appeals review, and provide for consolidation of multiple challenges in a single court of appeals. Taken together, they enable private entities, in structuring their operations, to act in reliance on agency orders once the time for review has expired. The Chamber of Commerce (Amicus Br. 6) describes this protection of reliance interests as "vital to the national economy," noting that "[o]nce rules are final, businesses build their operations, policies, and products around federal regulatory expectations, often over many years." See *id.* at 6-7 (examples).

In the TCPA context, the Hobbs Act ensures that businesses engaged in telemarketing can avoid liability in private TCPA suits by relying on safe harbors defined by the FCC. See, *e.g.*, *Leyse*, 545 Fed. Appx. at 445 (Hobbs Act barred collateral challenge to FCC's safe harbors in TCPA suit). In the present case, the interpretation reflected in the 2006 FCC order tends to support respondent's claim that petitioners violated the TCPA. Under petitioners' narrow conception of the Hobbs Act's exclusive-jurisdiction provision, however, a *plaintiff* in private TCPA litigation could likewise collaterally attack a prior FCC order that found the defendant's conduct to be lawful, urging the court to find the order invalid and to impose liability on the defendant. The Hobbs Act framework, and the reliance interests it serves, would be severely undermined if private parties could challenge the validity of covered orders in myriad courts, after the period for Hobbs Act challenge had passed.

B. Petitioners' Contrary Arguments Lack Merit

As noted above, petitioners contend (Br. 19) that the Hobbs Act judicial-review mechanism is exclusive only with respect to proceedings "for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government." Under that approach, litigants could assert the invalidity of covered agency actions in private civil suits long after the period for Hobbs Act review had expired. That interpretation should be rejected.

1. Petitioners' arguments lack a basis in the text

Petitioners identify no dictionary, treatise, or other source that defines "determine," "validity," or any other Hobbs Act term in a way that supports their truncated

conception of the Act's exclusive-jurisdiction provision. As explained above, when a court concludes that one party is not liable to another because an agency order reflects an impermissible interpretation of the governing statute or is otherwise unlawful, that court has "determin[ed] the validity of" the pertinent order under any natural understanding of that term.

Petitioners suggest (Br. 21) that several decisions of this Court support their narrow construction of the key statutory language. But those decisions simply describe declaratory-judgment actions as a way to determine the validity of a provision, without suggesting that such suits are the *only* mechanism for accomplishing that result. See *Calderon* v. *Ashmus*, 523 U.S. 740, 746 (1998) (describing prior decision as holding that a company "could bring a declaratory judgment action to determine the validity of insurance policies"); *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 91 (1945) (describing a suit "in a state court for a declaratory judgment to determine the validity" of a provision).

Petitioners also invoke (Br. 13-14) the interpretive canon *noscitur a sociis*. They argue that the terms "'enjoin,'" "'suspend,'" and "'set aside'" all refer "to a specific type of relief—injunctive," and that the term "'determine the validity'" therefore should be construed as referring to another "specific type of relief—declaratory." *Ibid.* (citation omitted). But *noscitur a sociis* has "no place, as this Court has many times held, except in the domain of ambiguity." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923); see *United States* v. *Stevens*, 559 U.S. 460, 474-475 (2010). The term "determine the validity" unambiguously encompasses the situation presented here, where a court

is asked to decide the lawfulness of a prior FCC order in resolving a dispute between private parties.

Moreover, as noted above, the Court in *Venner* held that the Urgent Deficiencies Act should be construed by reference to the practical effect of the suit in question, rather than to the relief for which the litigant "expressly pray[s]." 271 U.S. at 130. The Court thus recognized that a suit may be one to "set aside" an agency order even if it does not request injunctive relief against the government. *Ibid.* Given that holding, the *noscitur a sociis* canon cuts *against* petitioners' understanding of the term "determine the validity."

Petitioners' reliance on 28 U.S.C. 2349(a), entitled "Jurisdiction of the proceeding," is likewise misplaced. That provision states that, upon filing of a Hobbs Act suit, the court of appeals "has jurisdiction to vacate stay orders or interlocutory injunctions" and "to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." *Ibid.* Petitioners contend (Br. 22) that, "[i]n tying the 'determine the validity' phrase to a 'judgment,' § 2349 makes clear that the phrase refers to a remedy that the courts of appeals may enter as part of the judgment."

Petitioners' argument conflates the judicial relief that the Hobbs Act *authorizes* with the broader range of collateral attacks that it *forecloses*. The Hobbs Act authorizes courts of appeals to conduct direct review of covered agency actions, in a proceeding where the United States is named as respondent. Section 2349 delineates the court's jurisdiction and powers in conducting that form of direct review. In authorizing a review-

ing court "to make and enter * * * a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency," Section 2349(a) specifies the types of relief that a court may enter *in a Hobbs Act proceeding against the government*. 28 U.S.C. 2349(a).

The Hobbs Act's barrier to collateral attacks is set forth not in Section 2349, which defines the jurisdiction and powers of courts that conduct Hobbs Act review, but in Section 2342, which states that the Hobbs Act provides the "exclusive" means of obtaining specified types of rulings. Section 2342 does not contain the word "judgment" that petitioners highlight in Section 2349(a). Thus, rather than stating that courts of appeals have exclusive jurisdiction to enter "a judgment determining the validity of" a covered agency order (28 U.S.C. 2349(a)), Section 2342 states more broadly that those courts have exclusive jurisdiction "to determine the validity of" covered orders (28 U.S.C. 2342). Petitioners disregard that textual difference.

Petitioners also rely on a Communications Act provision directing that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission" must "be brought as provided by and in the manner prescribed in" the Hobbs Act. Pet. Br. 23 (quoting 47 U.S.C. 402(a)). Petitioners contend (*ibid.*) that because this provision refers "only to proceedings 'brought' to obtain non-monetary relief against the FCC," the Hobbs Act should be read to embody the same limitation. But the Communications Act provision is not plausibly read to reach only "proceedings 'brought' to obtain non-monetary relief against the FCC," *ibid.*, because the Court in *Venner* construed virtually identical language governing review under the Urgent Deficiencies Act to

lack such a limitation. 271 U.S. at 130; see Urgent Deficiencies Act, 38 Stat. 220 (provision governing "any suit brought to suspend or set aside, in whole or in part, any order of" a covered agency); see also 28 U.S.C. 46 (1934); pp. 17-18, *supra*. In any event, because the Hobbs Act defines the "exclusive jurisdiction" vested in the courts of appeals in broader terms than those used in the Communications Act, see 28 U.S.C. 2342, it would be inappropriate to import any textual limitations in Section 402(a) into the Hobbs Act's exclusive-jurisdiction provision.

Petitioners also suggest (Br. 34) that, if Congress had intended to foreclose collateral attacks on the validity of agency orders in private civil lawsuits, it would have stated that intent explicitly. As petitioners points out, some more recent jurisdiction-channeling provisions state that covered agency actions "shall not be subject to judicial review in any civil or criminal proceedings for enforcement." See *ibid.* (quoting 33 U.S.C. 1369(b)(2)) (emphasis omitted). But Congress enacted the Hobbs Act more than a decade before any of the provisions on which petitioners rely. Well before the Hobbs Act was enacted, moreover, the Court in *Venner* had held that the Urgent Deficiencies Act's conferral of exclusive jurisdiction foreclosed collateral challenges in litigation between private parties. 271 U.S. at 130. The fact that more recent Congresses have foreclosed collateral challenges through differently worded provisions—none of which include the term "exclusive jurisdiction"—does not cast doubt on the proper interpretation of the Hobbs Act.

2. *The Administrative Procedure Act does not support petitioners' reading of the Hobbs Act*

In arguing that the Hobbs Act's exclusive-jurisdiction provision is limited to suits for declaratory and injunctive relief against the government, petitioners rely in part (Br. 24-31) on 5 U.S.C. 703, a provision of the earlier-enacted APA. Section 703 provides in pertinent part that, *"[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law*, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703 (emphasis added). Section 703 thus establishes a general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit. The italicized language specifically contemplates, however, that judicial review of a prior agency action will be *un*available during enforcement proceedings if an "adequate" opportunity to obtain review was previously available and that avenue has been designated as "exclusive."

Petitioners suggest (Br. 24-31) that Section 703's prerequisites to preclusion of review are not satisfied here because the Hobbs Act does not afford petitioners an "adequate" opportunity to challenge the 2006 FCC order. That argument lacks merit.

a. Section 703's reference to an "adequate" opportunity for judicial review was drawn from this Court's pre-APA decisions addressing exclusive-jurisdiction provisions. In *Yakus*—decided two years before the APA was enacted—the Court held that foreclosure of judicial review in later enforcement proceedings posed no due process problem so long as litigants had previously received an "adequate" opportunity to challenge

the relevant agency order. 321 U.S. at 434, 436-437. The Court declined to deem "inadequate" the prior opportunity in *Yakus*, which involved filing a claim before the agency and then seeking review from a special Article III court. *Id.* at 436; see *id.* at 434-437; see also *Bowles* v. *Willingham*, 321 U.S. 503, 516 (1944) ("Here, as in the *Yakus* case, the standards prescribed by the act are adequate for the judicial review which has been accorded."). The Court thus made clear that exclusive-review mechanisms are not "inadequate" simply because litigants must present their claims to the agency and then seek judicial review within a particular time. See *Yakus*, 321 U.S. at 433-435 & n.3.

Section 703 is most naturally understood to incorporate the concept of "adequacy" that the Court articulated in *Yakus*. Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tulane L. Rev. 733, 741 n.34 (1983) (explaining that Section 703 "incorporates the 'adequacy' standard of *Yakus*"); see Samuel A. Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316, 353 n.205 (1975) (describing Section 703 as a "codification of [the] *Yakus* rule"). That inference is confirmed by the *Attorney General's Manual on the Administrative Procedure Act* (1947) (*APA Manual*), which this Court has repeatedly cited as a persuasive authority. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing cases). The manual explains that the APA incorporates "the legal standard which courts * * * ha[d] already developed" regarding "the adequacy of statutory review procedures," *APA Manual* 98, and that Section 703's statement regarding a "'prior, adequate,

and exclusive'" channel of review simply "restates existing law," *id.* at 99 (citations omitted); see *id.* at 100.

b. Petitioners' arguments for viewing Hobbs Act review as inadequate here are untethered to the concept that the APA incorporated. They are also implausible on their own terms.

Petitioners suggest (Br. 25-26) that Hobbs Act channels were not "adequate" within the meaning of Section 703 because petitioners could not have asserted a Hobbs Act challenge to the 2006 FCC order when respondent commenced the present suit in 2014. Petitioners are correct that they could not have invoked the Hobbs Act review mechanism at that time, both because they never presented their claims to the agency in connection with the 2006 order and because a Hobbs Act petition for review filed in 2014 would have been untimely.[5] Contrary to petitioners' suggestion, however, a mode of judicial review is not inadequate simply because a particular litigant fails to satisfy the statutory prerequisites for invoking it.

As one court explained in rejecting a similar argument, "'[i]t is hard to believe'" that Congress would have prescribed "a centralized forum [for] review," but "'made the remedy optional and contemplated that the regulation could also be challenged by defiance.'" *United States* v. *Szabo*, 760 F.3d 997, 1006 (9th Cir.

---

[5] An entity becomes a "party aggrieved" entitled to seek Hobbs Act review of an agency determination by presenting its views to the agency—typically through a comment or other written submission on a proposed rule. *Water Transp. Ass'n* v. *ICC*, 819 F.2d 1189, 1192-1993 (D.C. Cir. 1987) (citation omitted). Parties also commonly become "part[ies] aggrieved" by seeking timely reconsideration of an order. 47 U.S.C. 405; see 47 C.F.R. 1.429(j). Reconsideration may be sought on grounds of "material error, omission, or [other] reason warranting reconsideration." 47 C.F.R. 1.429(*l*)(1).

2014) (citation omitted); see 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3943 (2012 & Supp. 2018). Petitioners' theory is also inconsistent with *Transatlantic*, in which the Court held that a litigant's collateral attack was precluded even though the passage of time had made Hobbs Act review unavailable. See 400 U.S. at 66-69. Petitioners are thus incorrect in suggesting that the Hobbs Act channel for review became inadequate simply because petitioners' failure to comply with its timing and agency-exhaustion requirements means that the channel is not now available to them.

Petitioners also suggest (Br. 26) that the Hobbs Act's review mechanism was inadequate because petitioners "had no basis to suspect" that the 2006 order would be construed as establishing that faxes offering free goods constitute "advertisements" under the TCPA. Petitioners' premise, however, is directly contrary to a holding below that this Court declined to review. The court of appeals found that the 2006 order was "clear and unambiguous," Pet. App. 13a, and articulated "this simple rule: faxes that offer free goods and services are advertisements under the TCPA," *id.* at 14a. Because this Court's grant of certiorari was limited to the question whether the Hobbs Act required the district court to accept the FCC's interpretation of the TCPA, 139 S. Ct. 478, petitioners' contention that the 2006 FCC order was actually ambiguous is not properly before the Court.[6]

---

[6] Courts that lack jurisdiction to determine the validity of particular agency orders remain free to resolve ambiguities in those orders, and to consider the broader statutory scheme in deciding how an ambiguous agency pronouncement should be construed. Thus, a

Petitioners also posit (Br. 27-38, 33) other fact patterns under which the Hobbs Act review mechanism could be inadequate. Petitioners suggest that the statutory time limitations would make Hobbs Act review inadequate for "parties that first come into existence after the 60-day direct review window has closed," *id.* at 28, or in a case where Congress has superseded a rule by statute, *id.* at 33. That argument provides no sound basis for declining to enforce the Hobbs Act's exclusivity provision here.

Even in circumstances where a particular challenge could not feasibly have been brought within the initial 60-day window for seeking Hobbs Act review, potential challengers are not without recourse under the Hobbs Act. See *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) ("[A]n agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed."); see also *Natural Res. Def. Council* v. *Nuclear Regulatory Comm'n*, 666 F.2d 595, 603-604 (D.C. Cir. 1981). In any event, the possibility that the Hobbs Act review mechanism might be inadequate for other litigants with different claims does not mean that petitioners themselves lacked a "prior, adequate, and exclusive opportunity for judicial review" of the 2006 FCC order. 5 U.S.C. 703. Petitioners have identified no basis for doubting that they could feasibly

---

court may choose, among "permissible reading[s]" of an agency regulation, the one that the court considers most in "harmony with the [court's] view of the statute." *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 573 (2007). But it may not "determin[e] that the regulation as written is invalid." *Ibid.*; see *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 608-609 (2013).

have utilized the Hobbs Act procedure to challenge the 2006 order. See *Yakus*, 321 U.S. at 447 (defendants could not collaterally attack regulation when they had not used "the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so").

In discussing *Transatlantic* and *ITT*, petitioners acknowledge that, when an order "settl[es] the rights or duties of a specific party" (Br. 29), or when a party participated in or was "adequately represented[] in" agency proceedings (Br. 31), the Hobbs Act's time-limited channels provide that party an adequate opportunity for review. Petitioners suggest (Br. 28), however, that no other regulated party can be expected to "stay[] abreast of rule-makings" or to challenge an assertedly unlawful agency rule before that rule is applied to its own activities. But the expectation that regulated parties will keep abreast of agency actions that may affect their operations is a basic premise of federal law. Federal law provides—and this Court's decisions reflect—that "the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947); see 44 U.S.C. 1507 ("Unless otherwise specifically provided by statute, filing of a document" in the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it"); see also *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). Petitioners are therefore mistaken in contending that the Hobbs Act provides an inadequate mechanism for challenges to agency rules of general applicability.

3. Petitioners' other statutory arguments also lack merit

Petitioners argue (Br. 31-33) that the Hobbs Act should be construed to allow collateral challenges to the validity of rules in civil litigation between private parties because certain other agency-review statutes channel declaratory-judgment challenges to appellate courts while also permitting challenges to regulations during enforcement actions. But the Hobbs Act—unlike the statutes that petitioners invoke—vests the courts of appeals with "exclusive jurisdiction" to "determine the validity of" the classes of agency actions specified in the statute. 28 U.S.C. 2342. The clear import of that statutory language is reinforced by the fact that two statutes from which critical Hobbs Act language was drawn had previously been construed to foreclose collateral attacks in civil suits and enforcement actions. See *Venner*, 271 U.S. at 128-130; *Yakus*, 321 U.S. at 429-430.

Petitioners also invoke (Br. 27) court of appeals decisions holding that, when an agency applies an order in a later proceeding that is itself subject to review under the Hobbs Act, the new Hobbs Act proceeding may include review of the earlier order. See, *e.g.*, *Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959). But the decisions on which petitioners rely reflect the conclusion that an agency action that applies a past determination starts a new sixty-day period for review under the Hobbs Act. Even then, review must be obtained in the court of appeals under the Hobbs Act procedures. The courts of appeals have uniformly rejected arguments that district courts may entertain collateral attacks on covered orders that are brought outside the Hobbs Act's channels. See pp. 12-13, *supra*.

Petitioners' reliance (Br. 35) on the presumption of reviewability is similarly misplaced. Absent clear evidence of a contrary congressional intent, courts presume that "Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption is implicated, however, only when one potential reading of a statute would insulate particular agency action from *all* judicial review. In this case, the Fourth Circuit did not dispute that the 2006 FCC order was subject to judicial review; it simply held that the Hobbs Act procedures were the sole means by which such review could be obtained. "Because court of appeals review is available, this case does not implicate 'the strong presumption that Congress did not mean to prohibit all judicial review.'" *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 n.8 (1994) (citations omitted).

4. Principles of constitutional avoidance do not support petitioners' approach

Petitioners press (Br. 39-45) constitutional arguments that were neither raised nor addressed below. They contend that, to avoid potential constitutional concerns, this Court should construe the Hobbs Act's exclusive-jurisdiction provision as limited to suits seeking declaratory or injunctive relief. The principle that constitutional difficulties should be avoided if possible, however, "does not give the court the authority to rewrite a statute as it pleases," but simply permits a court to "'choose between competing plausible interpretations of a statutory text.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 843 (2018) (brackets, citation, and emphasis omitted). Given its language, the history of its operative terms, and this Court's precedents, the Hobbs

Act cannot plausibly be read to contain the limitation that petitioners advocate.

In any event, petitioners' constitutional claims lack merit. Due process does not require that litigants be permitted to challenge an agency order at whatever time, or in whatever forum, they prefer. It instead "requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones* v. *Flowers*, 547 U.S. 220, 226 (2006) (citation and internal quotation marks omitted). Here, petitioners had adequate notice and a meaningful opportunity to obtain review of the 2006 order. See *Merrill*, 332 U.S. at 384-385; *International Minerals*, 402 U.S. at 563; 44 U.S.C. 1507.

The availability of judicial review also refutes petitioners' separation-of-powers argument (Br. 41-45). The Hobbs Act does not deny the federal judiciary the power to decide the legality of covered agency actions. Rather, the Act simply specifies review procedures to promote finality, uniformity, and judicial economy, and to ensure that orders are reviewed with the participation of the government and on a developed administrative record. "There is no constitutional requirement that [a challenge] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process." *Yakus*, 321 U.S. at 444; see *United States* v. *Ruzicka*, 329 U.S. 287, 292-294 (1946). Quoting Professor Hart, petitioners question whether, "in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court *where no adequate opportunity to have them determined by a court has been previously accorded*."

Pet. Br. 42 n.7 (emphasis added). Because petitioners had an adequate opportunity to obtain Hobbs Act review of the 2006 FCC order, that question is not implicated here.

II. PETITIONERS' ARGUMENT THAT THE 2006 FCC ORDER WAS NOT REVIEWABLE UNDER THE HOBBS ACT IS NOT PROPERLY BEFORE THIS COURT, AND LACKS MERIT IN ANY EVENT

In their merits brief, petitioners argue for the first time (Br. 45-50) that the 2006 FCC order was "not reviewable under 47 U.S.C. § 402(a) or the Hobbs Act" because the order constitutes an interpretive rule. Pet. Br. 49. The argument is not properly before the Court. It also lacks merit.

The court of appeals observed that "[n]either party has disputed that the 2006 FCC Rule is the sort of 'final order' contemplated by the Hobbs Act." Pet. App. 7a n.1. In seeking this Court's review, petitioners did not challenge that characterization of the arguments below, nor did they dispute that the 2006 order was covered by the Hobbs Act. Nor did petitioners raise any other argument based on the status of interpretive rules. Instead, they contended (Pet. 13-20) that the district court had not "determine[d] the validity of" the order within the meaning of Section 2342. An "argument" that was "not raise[d]" or "address[ed]" below is "forfeited." *United States* v. *Jones*, 565 U.S. 400, 413 (2012).

In any event, the statute's "exclusive" review framework extends to "all final orders * * * made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1). Section 402(a), in turn, makes reviewable "any order of the Commission," 47 U.S.C. 402(a), except for certain licensing decisions. The availability of Hobbs Act review therefore does not turn on whether the 2006 order sets

out a legislative rule or instead constitutes an interpretive rule. Surrounding subprovisions governing Hobbs Act review of other agencies' actions reinforce that conclusion. Several make reviewable "*all* rules [or] regulations" issued by particular agencies under specified statutory provisions, see 28 U.S.C. 2342(3) and (5) (emphasis added)—language that likewise draws no distinction between legislative and interpretive rules.

Section 2342 thus "contains no exception for 'interpretive' rules.'" *US West Commc'ns, Inc.* v. *Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000). Accordingly, courts applying the Hobbs Act have consistently treated as reviewable even those FCC orders that set out interpretive rules. See, *e.g.*, *Sorenson Commc'ns, Inc.* v. *FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009); *SBC Inc.* v. *FCC*, 414 F.3d 486, 501 (3d Cir. 2005); *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 213 (D.C. Cir. 2005). Petitioners therefore identify no sound basis for doubting that the 2006 FCC order could have been reviewed under the Hobbs Act when issued.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
LINDSEY POWELL
Attorneys

THOMAS M. JOHNSON, JR.
General Counsel
JACOB M. LEWIS
Associate General Counsel
SCOTT M. NOVECK
Counsel
Federal Communications Commission

FEBRUARY 2019

APPENDIX

1. 28 U.S.C. 2342 provides:

Jurisdiction of the court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

2. 28 U.S.C. 2344 provides:

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

3. 28 U.S.C. 2348 provides:

Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

4. 28 U.S.C. 2349(a) provides:

Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining

the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

5. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

6. 47 U.S.C. 227 (2012 & Supp. V 2017) provide in pertinent part:

Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

* * * * *

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or qual-

ity of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

* * * * *

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

* * * * *

(2) **Regulations; exemptions and other provisions**

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited

advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

* * * * *

7. 47 U.S.C. 402(a) provides:

Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.